
In Kisor v. Wilkie the Federal Circuit deferred to the Veterans Administration’s (VA) definition of “relevant” when determining whether a veteran’s claim for benefits can be reconsidered.

James Kisor is a Vietnam veteran who participated in Operation Harvest Moon. In 1983 a VA psychiatrist, while noting Kisor’s participation in this operation, determined he didn’t have PTSD. Kisor was denied disability benefits. In 2007 Kisor was diagnosed with PTSD and the VA gave him full disability benefits prospectively. Kisor also asked the VA to “reconsider” his case and provide him with an effective date of benefits of 1983.

Per regulation, VA’s receipt of “relevant” official service department records that existed and had not been associated with the claims file when VA first decided the claim” allow an application to be reconsidered. Kisor claimed that his Combat History document and other paperwork from 1983 that document his participation in Operation Harvest Moon were such records.

Kisor didn’t argue that these records show that he was diagnosed with PTSD in 1983. Instead he claims that these records were “relevant” “because they speak to the presence of an inservice stressor, one of the requirements of compensation for an alleged service-connected injury.” The VA claims they are not “relevant” because “they addressed the matter of an in-service stressor, which was not ‘in issue,’ rather than the issue of whether he suffered from PTSD, which was ‘in issue.’”

Kisor argued for a broad definition of “relevant” and the VA argued for a narrow definition. Deferring to the VA the Federal Circuit adopted the VA’s narrow definition of “relevant” noting it isn’t “plainly erroneous or inconsistent” with the VA’s regulatory framework.

The SLLC amicus brief argues the Supreme Court should overturn Auer. “By demanding deference to an agency’s interpretation of its own regulations, Auer provides a powerful incentive for agencies to abandon the notice-and-comment process that facilities dialogue among federal, state, and local governments. This, in turn, invites dramatic shifts in federal policy with each new administration—and tends to result in policies that lack the clarity and wisdom that public participation can engender. Worse still, when agencies do engage in notice-and-comment rulemaking under the Auer regime, they do so knowing that by crafting ambiguous regulations they can expand their own power to unilaterally dictate federal policy through subsequent interpretation.”

Allyson N. Ho, Kathryn Cherry, and Elizabeth A. Kiernan of Gibson, Dunn & Crutcher wrote the SLLC amicus brief which the following organizations joined: the National Conference of State Legislatures [6], the Council of State Governments [7], the National Association of Counties [8], the United States Conference of Mayors [9], the International City/County Management Association [10], and International Municipal Lawyers Association [11], the Government Finance Officers Association, and the National